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Supreme Court, U.S.
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No. 94-0053

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, affiliated with the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO,

Petitioner,

v.

INDEPENDENT SPRINKLER CORP.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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22 pp

QUESTIONS PRESENTED

1. Does the Eleventh Circuit's decision conflict with decisions of other circuits regarding a successor employer's duty to arbitrate under an agreement with the predecessor's union?

2. Is the Eleventh Circuit's decision contrary to a majority of the circuit courts with respect to the interpretation and scope of section 301?

3. Does the Eleventh Circuit's decision conflict with the precedent of the Court regarding the method for determining work-force continuity in successorship cases?

PARTIES BELOW

The Plaintiff and Appellee in the proceedings below was:

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, affiliated with the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO.

The Defendant and Appellant in the proceedings below was:

Independent Sprinkler Corp.

The following companies were Defendants in the proceedings before the District Court and appealed from the District Court Order, but withdrew their appeals and did not participate in the proceedings in the Court of Appeals:

Moore Pipe & Sprinkler Co.
Independent Sprinkler and Fire Protection Co.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

1. Does the Eleventh Circuit's decision conflict with existing law regarding a successor employer's duty to arbitrate under an agreement with the predecessor's union? i

2. Is the Eleventh Circuit's decision contrary to a majority of the circuit courts with respect to the interpretation and scope of section 301? i

3. Does the Eleventh Circuit's decision conflict with the precedent of the Court regarding the method for determining work-force continuity in successorship cases? i

PARTIES BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 6

I. The Eleventh Circuit's Decision Does Not Create a Conflict With Respect to a Successor's Duty to Arbitrate 6

II. The Eleventh Circuit's Characterization of the Underlying Agreement Was Correct and Does Not Conflict with Other Circuits 11

III. The Decision Below is Consistent with the Precedent of the Court with Respect to the Method for Determining Workforce Continuity 13

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

EPE, Inc. v. NLRB, 845 F.2d 483 (4th Cir. 1988) . . 7

Esmark, Inc. v. NLRB, 887 F.2d 739 (7th Cir. 1989) 8

Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987) 6, 7, 8, 9

Graduate Plastics Co. v. Automobile Workers, District 65, 991 F.2d 997 (2d Cir. 1993) 6, 9

Howard Johnson Co. v. Hotel & Restaurant Employees, 417 U.S. 249 (1974) 11

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) 7

NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972) 7

NLRB v. Rockwood Energy & Mineral Corp., 942 F.2d 169 (3d Cir. 1991) 7

New England Mechanical, Investment v. Laborers Local Union 294, 909 F.2d 1339 (9th Cir. 1990) 7

Operating Engineers Local 150 v. Centor Contractors, Inc., 831 F.2d 1309 (7th Cir. 1987) 6, 10

Southward v. South Central Ready Mix Supply Corp., 7 F.3d 487 (6th Cir. 1993) 7

Steelworkers v. United States Gypsum Co., 492 F.2d 713 (5th Cir. 1974), *cert. denied*, 419 U.S. 998 (1974) 6

Sullivan Industries v. NLRB, 957 F.2d 890 (D.C. Cir. 1992) 7

Teamsters Local 249 v. Bill's Trucking, Inc., 493 F.2d 956 (3d Cir. 1974) 6, 11

U.S. Can Co. v. NLRB, 984 F.2d 864 (7th Cir. 1993) 7

STATUTES

29 U.S.C. § 185(a) 2

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ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, affiliated with the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO,

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INDEPENDENT SPRINKLER CORP.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The petition should be denied because the Judgment of the United States Court of Appeals for the Eleventh Circuit does not conflict with decisions of other circuits or the Court, and does not otherwise provide a basis for this Court to review the decision below.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 10 F.3d 1563 and is reproduced in the appendix to the Petition for Writ of Certiorari beginning at page 21a. The decision of the United States District Court for the Middle District of Florida is reported at 136 L.R.R.M. 2693 and is reproduced at page 1a of the appendix.

STATUTE INVOLVED

29 U.S.C. § 185(a):

(a) **Venue, amount, and citizenship.** Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

In its complaint, the Petitioner (the "Union") alleged that Independent Sprinkler and Fire Protection Co. ("Independent I"), Moore Pipe & Sprinkler Co. ("Moore Pipe") and Respondent, Independent Sprinkler Corp. ("Independent II") violated certain terms of the Settlement Agreement entered into between the Union, Moore and Independent I.[1] [App. 35a]. While Independent II is not a

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[1] In its brief to the Eleventh Circuit, Respondent referred to Independent Sprinkler and Fire Protection Co. as "ISFP" and to itself as "Independent." In this Brief in Opposition, Respondent will refer to such

party to the Settlement Agreement, the Union alleges that Independent II is liable to the Union under the Settlement Agreement as a "successor corporation."

Moore Pipe is a Florida corporation which was incorporated in 1926 engaged in the fire protection business, and has been a union contractor for many years. [App. 36a]. Independent I was a Florida corporation in the business of fire protection contractor with its principle place of business in Jacksonville, Florida operating on a non-union basis. [App. 36a]. Independent II was incorporated in Florida in August, 1987, and like Independent I, is a non-union fire protection contractor. [App. 38a]. Moore Pipe and Independent I were owned by Williamson Feed Mills, Inc. ("Williamson"), which in turn was owned by Mack Evans, Jr (25%), Jerry B. Evans (25%), Randy T. Evans (25%) and the Evans Family Trust (25%). [App. 36a]. In April, 1987, the Officers and Directors of Independent I were as follows:

Directors	Mack Evans (Chairman of the Board)
	Randy Evans
	Robert Matthews

Officers

President/Treasurer	Randy Evans
Vice President	Robert Matthews
Secretary	Mack Evans

---

parties as Independent I and Independent II, respectively, although Respondent believes that such nomenclature could be misleading in light of the issues involved in this case. As the Eleventh Circuit used Independent I and II in its decision, as the Union has in its Petition, Respondent will do the same for the sake of consistency and to minimize confusion.

In the summer of 1987, Mack Evans, who was Chairman of the Board of Williamson, decided to shut down the operations of Independent I for economic reasons. [App. 37a]. Shortly thereafter, Randy Evans and the other shareholders of Williamson decided to sever their business relationship, and Randy Evans sold his stock in Williamson to the company for approximately $250,000. [App. 37a].

In late August of 1987, Randy Evans formed Independent II, which began active operations in early November, 1987. [App. 38a]. When it commenced operations, Independent II hired 32 former employees of Independent I. [App. 39a]. In 1987 Independent I had 142 employees. [App. 39a]. From its inception and during all times relevant to this case, Independent II was owned by the following persons:

Randy Evans	19%
Robert Matthews	18%
Tucker Evans	9%

The remaining 54% of Independent II was owned by the following employees or former employees:

Robert Bollo	Jimmy Grey
Norman LaRochelle	David Overman
Jimmy Roberts	John Swanson
James Sweat	Louis Sweat
Bill Taylor	Don Thomas
Albert Turner	Danny Wilkinson

Randy Evans was the only owner of Independent II (19%) who previously had an ownership interest in Independent I (25%). Also during this time, the Officers and Directors of Independent II were as follows:

Directors

Randy Evans	Robert Matthews
Tucker Evans	Danny Wilkinson
David Overman	Jimmy Grey
Bill Taylor	Norman LaRochelle

Officers

President	Randy Evans
Vice President	Robert Matthews
Vice President	Tucker Evans

Subsequent to its commencement of operations, Independent II was awarded contracts for projects in Florida, Georgia and South Carolina, which were performed on a non-union basis. [App. 44a]. The Union alleged that the Settlement Agreement was breached by Moore Pipe, Independent I *and* Independent II as a result of Independent II's work in Georgia and South Carolina, and asked the lower court to order the parties to binding arbitration. [App. 35a].

The District Court granted the Union's motion for summary judgment and ordered all parties to binding arbitration. Independent II appealed and the Eleventh Circuit reversed, ordering the District Court to enter judgment in favor of Independent II.

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit's Decision Does Not Create a Conflict With Respect to a Successor's Duty to Arbitrate.

In its petition, the Union first asserts that the Eleventh Circuit's decision creates a conflict with the Second, Third, Fifth and Seventh Circuits with respect to a successor employer's duty to arbitrate. *Graduate Plastics Co. v. Auto Workers, Dist. 65*, 991 F.2d 997 (2d Cir. 1993); *Operating Engrs. Local 150 v. Centor Contractors, Inc.*, 831 F.2d 1309 (7th Cir. 1987); *Steelworkers v. United States Gypsum Co.*, 492 F.2d 713, 725-27 (5th Cir. 1974), *cert. denied*, 419 U.S. 998 (1974); *Teamsters Local 249 v. Bill's Trucking, Inc.*, 493 F.2d 956 (3d Cir. 1974). To the contrary, a review of these decisions reveals that what the Union asserts as a conflict among the circuits is merely a recognition that under *certain* facts, it *can* be appropriate to require a successor to arbitrate.

In finding that Independent II should not have been required to arbitrate, the Eleventh Circuit properly held

> Ordinarily the successor is not bound by substantive provisions of a preexisting collective bargaining agreement between the union and the predecessor. . . . The "rightful prerogative of owners independently to rearrange their businesses" is preserved.

[App. 25a; *citing*, *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 36-39 (1987)]. The Eleventh Circuit properly followed the precedent of this Court, namely, *Fall River* and *NLRB v. Burns International Security Services,*

Inc., 406 U.S. 272 (1972). As the Court explained in *Fall River*

> We observed in *Burns* that, although the successor has an obligation to bargain with the union, it "is ordinarily free to set initial terms on which it will hire the employees of a predecessor . . . *and it is not bound by the substantive provisions of the predecessor's collective-bargaining agreement.*

107 S. Ct. at 2234 (emphasis added); *accord*, *Southward v. South Cent. Ready Mix Supply Corp.*, 7 F.3d 487, 493-95 (6th Cir. 1993); *Sullivan Industries v. NLRB*, 957 F.2d 890, 895 (D.C. Cir. 1992); *U.S. Can Co. v. NLRB*, 984 F.2d 864, 869 (7th Cir. 1993); *NLRB v. Rockwood Energy & Mineral Corp.*, 942 F.2d 169 (3d Cir. 1991); *EPE, Inc. v. NLRB*, 845 F.2d 483 (4th Cir. 1988); and *New England Mechanical, Inv. v. Laborers Local Union 294*, 909 F.2d 1339 (9th Cir. 1990). Thus, combining the two fundamental principals that (a) the duty to arbitrate is created by contract and (b) a successor ordinarily is not bound by the substantive provisions of the predecessor's contracts, results in the general rule followed by the Eleventh Circuit that a successor will not be obligated to arbitrate disputes arising out of the predecessor's agreements.

The Eleventh Circuit correctly noted, however, that under certain facts and circumstances, a successor may be required to honor the substantive provisions of a predecessor's collective bargaining agreement, including an arbitration provision. This may be the result, for example, when the successorship relationship results from a merger in which the predecessor disappears and the successor hires all of the predecessor's employees. [App 28a]. *John Wiley &*

Sons, Inc. v. Livingston, 376 U.S. 543 (1964); *Esmark, Inc. v. NLRB*, 887 F.2d 739, 750-51 (7th Cir. 1989). The Eleventh Circuit in this case held "[t]his is not a *Wiley* case," finding essentially two fundamental distinctions between this case and *Wiley*. [App. 28a].

First, this case did not involve a merger and "wholesale transfer" of all employees from the predecessor to the successor, as was the case in *Wiley*. In this case, Mack Evans, the Chairman of the Board of the parent corporation of Independent I (and who has never had any direct or indirect interest in Independent II) made the decision to shut down Independent I. [App. 37a]. Randy Evans, Tucker Evans, Robert Matthews and some of the other former Independent I employees, all of whom were essentially unemployed after the closure of Independent I, subsequently started up and began doing business through Independent II, which hired just 32 of Independent I's 142 employees (22%). [App. 39a]. In addition, the only similarity in ownership between Independent I and Independent II was Randy Evans' *minority* ownership in both companies -- 25% and 19%, respectively. [App. 36a, 41a].

The second critical distinction that the Eleventh Circuit drew between this case and *Wiley* and its progeny was the fact that this case does not involve an alleged successor to a union-employer. The rationale and policy underlying the successorship doctrine, as most recently enunciated by this Court in *Fall River*, is not present in this case. A review of the successorship decisions cited by both parties in this case reveals that the purpose of the doctrine is to protect employees represented by a union from being automatically and summarily disenfranchised by a corporate restructuring, sale, merger or reorganization. *See e.g.*, *Fall River*, 107 S. Ct. at 2233.

Thus, a successor has an obligation to bargain in good faith with the union that represented the predecessor's employees. *Fall River*, 482 U.S. at 38-39. Clearly, this concept has no application to the facts of this case involving an alleged successor (Independent II) to a non-union employer (Independent I) that had no collective bargaining relationship with the union. Moore Pipe was the only employer who had a collective bargaining relationship and there is no allegation that Independent II is a successor to Moore Pipe. Rather, as noted by the Eleventh Circuit, the Union's collective bargaining relationship with and remedies against Moore Pipe remain intact. [App. 28a].

Each of the four decisions cited by the Union as being in conflict with the decision below is a case where the circuit court found, based on the facts and circumstances presented, that the case was more similar to *Wiley*, thereby justifying the requirement that the successor arbitrate with the union. Moreover, each decision involved a union's allegation that the employer was the successor to an employer which had a collective bargaining relationship with the union. Thus, the labor law policy of "promot[ing] stability in *collective-bargaining relationships*," was present and further supported requiring the successor to arbitrate. Fall River, 107 S. Ct. at 2233 (emphasis added).

In *Graduate Plastics*, the Second Circuit held that, similar to *Wiley*, all of the predecessor's employees were retained by the successor, the same plant was operated making the same products, the business retained the same name as the predecessor and employee benefits were calculated based on service time with both the successor *and* the predecessor. *Graduate Plastics*, 991 F.2d at 1001. Furthermore, the successor actively participated in the arbitration proceeding and knew of the union's claim at the

time of the sale. The facts of *Graduate Plastics* are admittedly similar to the facts of *Wiley*, however readily distinguishable from the facts of this case, *Burns* and others finding that a successor could not be required to arbitrate pursuant to the predecessor's agreement.

The Union places substantial reliance on *Centor Contractors* as being a case with which the decision below conflicts. [Pet. 10]. Such reliance is misplaced for the following reasons. First, *Centor Contractors* was an action to enforce an arbitration award obtained against the predecessor and *subsequently* sought to be enforced against the successor. 831 F.2d at 1310. Thus, the case did not address the issue of whether the successor should be required to arbitrate.

Second, the circuit court in *Centor Contractors* affirmed the district court's decision of liability under the successorship *and* alter ego doctrines. In this case, the Eleventh Circuit properly found that the Union abandoned its alter ego theory and that the district court expressly declined to address the alter ego theory. And third, the facts in *Centor Contractors* supported the district court's findings that the predecessor and successor were so intertwined as to justify the enforcement of the arbitration award against the successor. The Eleventh Circuit's decision accordingly does not conflict with *Centor Contractors*.

Bill's Trucking likewise does not evidence a conflict created by the Eleventh Circuit's decision. The Third Circuit in *Bill's Trucking* held that an issue of fact remained as to whether the alleged successor could be bound by the predecessor's collective bargaining agreement, thereby reversing the district court's grant of summary judgment in favor of the successor. The court recognized

> [t]his is not to suggest, of course, that in every case a successor employer may properly be held to the provisions of his predecessor's labor contract.

Bill's Trucking, 493 F.2d at 963. That case involved "a simple purchase of stock, followed only by a change in corporate name and some minor changes in business operations." *Id.* In addition, the circuit court in *Bill's Trucking* distinguished *Burns* on the ground that *Burns* was an unfair labor practice and not a suit under § 301 -- a distinction that was expressly dismissed as inappropriate in *Howard Johnson Co. v. Hotel & Restaurant Employees*, 417 U.S. 249 (1974). Thus, neither *Bill's Trucking* nor the other cases cited by the Union evidence a conflict in the circuits as a result of the Eleventh Circuit's decision.[2]

II. The Eleventh Circuit's Characterization of the Underlying Agreement Was Correct and Does Not Conflict with Other Circuits

Beginning at page 14 of its Petition, the Union asserts that the Eleventh Circuit's decision regarding the scope of § 301 "is contrary to a majority of the Circuit Courts and degrades § 301 as a forum for resolving labor disputes." The Union asserts that the Eleventh Circuit incorrectly limited § 301 contracts to collective bargaining agreements,

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[2]The fourth case cited by the Union, *U.S. Gypsum*, is not specifically discussed in the Petition. That case, a 1974 decision prior to numerous cases clarifying the limits of a successor's obligations, is simply another example of a decision finding that based on the particular facts of the case -- the facts being more similar to *Wiley* than *Burns* -- the successor could be required to arbitrate.

rather than using a more expansive interpretation as utilized by the circuits in the cases cited in the Petition.

The Union's argument is erroneous, however, because the Eleventh Circuit *did not* hold that § 301 applies only to collective bargaining agreement. Rather, the court held there was no collective bargaining relationship between the Union and Independent I (which is not disputed) and therefore, there could be no collective bargaining relationship to be "passed on" to Independent II.

With respect to the language of the decision quoted by the Union, when read in context it is clear that the Eleventh Circuit was discussing the concept that the duty of a successor under *Fall River* to "bargain in good faith with the union" clearly cannot apply to a successor of a non-union employer. Common sense alone tells us that a successor to a non-union predecessor cannot have the duty to bargain with the union because there was no collective bargaining relationship between the union and the predecessor -- the predecessor had no duty to bargain with union to begin with. Thus, the Eleventh Circuit properly concluded that

> the successorship doctrine may not be utilized to force an alleged successor employer, Independent II, into a collective bargaining relationship in which its alleged predecessor, Independent I, was not a participant.

[App. 26a]. This aspect of the decision simply holds that the *Fall River* successorship doctrine cannot be utilized to impose a duty to bargain on a successor where the predecessor had no such duty. The doctrine and rationale underlying it, as evidenced by the numerous decisions invoking it, applies to situations involving the duties of a

successor to a union employer. Thus, the Eleventh Circuit did not hold, as urged by the Union, that § 301 applies only to collective bargaining agreements, nor does the decision interject "the precondition of a 'collective bargaining relationship' between the parties upon enforcement of a grievance settlement agreement under § 301.

III. The Decision Below is Consistent with the Precedent of the Court with Respect to the Method for Determining Workforce Continuity

As its third reason for granting the petition, the Union contends that the decision below is contrary to the precedent of the Court and recreates a conflict among the circuits regarding the method for determining workforce continuity for successorship cases. Again, upon reading the language quoted by the Union in context, it is clear that in this regard the Eleventh Circuit merely held that the facts of *this* case did not fall into the exception to the general rule that "a successor is only bound to collectively bargain and is not bound to any extent by an existing contract between the union and the predecessor." [App. 28a].

The Eleventh Circuit noted

> In some narrow circumstances, however, there may be an exception to the rule that the successor inherits only a duty to bargain and does not inherit a preexisting collective bargaining contract.

The court then discussed two situations as a guide in explaining the exception. If the successor employer is a result of a

> merger in which the original employer has disappeared and the new employer has hired all of the old employer's workers, the successor *may* by required to honor an arbitration provision of the preexisting collective bargaining agreement.

(Emphasis added; *citing*, *Wiley* and *Esmark* as illustrative cases). On the other hand (and other end of the spectrum), "if there is a mere sale of assets and the predecessor employer remains in business as a viable entity, the successor may not be required to honor the preexisting agreement to arbitrate". The Eleventh Circuit then properly concludes "[t]his is not a *Wiley* case," which supports the finding that this case falls into the exception to the general rule that "a successor is only bound to collectively bargain and is not bound to any extent by an existing contract between the union and the predecessor."

The Eleventh Circuit did not hold (as would be necessary for the Union's argument to be correct) that in order to be a "successor" with the obligation to bargain in good faith the alleged successor must have hired all of the predecessor's employees. Such wholesale hiring may support the additional imposition of the substantive terms of the predecessor's agreements, but is not the exclusive factor to be considered. To the contrary, the Eleventh Circuit recognized the seven factors that should be considered in determining the successorship issue. [App 26a].

Thus, contrary to the Union's assertion, the decision below does not alter or purport to alter the standard for determining workforce continuity in successorship cases. The language of the decision cited by the Union ("Independent II has hired some but not all of Independent

I's employees") has to do with the Eleventh Circuit's finding that even assuming Independent II is a "*Fall River* successor" (as opposed to a successor under state contract or corporate law, or an alter ego successor) the facts giving rise to the successorship does not render Independent II liable for the substantive terms of Independent I's agreements (such as the provision in the Settlement Agreement requiring arbitration) as an exception to the general rule that a successor is not so liable.

CONCLUSION

The Petition should denied as the Eleventh Circuit's decision does not create a conflict among the circuits and is consistent with prior decisions of this Court.

Respectfully Submitted,

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